


IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

2008 MAY 29 AM 9:54

CLERK

STATE OF TENNESSEE, *ex rel.* 
ROBERT E. COOPER, JR., D.C.
ATTORNEY GENERAL and
REPORTER,

Petitioner,

v.

No. 08-1690

EXPRESS SCRIPTS, INC.,
a Delaware corporation,

Respondent.

PETITION

The State of Tennessee, by and through Robert E. Cooper, Jr., the Attorney General and Reporter, (hereinafter "Attorney General"), at the request of the Director of the Division of Consumer Affairs of the Department of Commerce and Insurance (hereinafter "Division"), files this Petition pursuant to Tenn. Code Ann. § 47-18-107 of the Tennessee Consumer Protection Act of 1977 (hereinafter "the Act"), and respectfully shows the Court as follows:

1. The Division and the Attorney General, acting pursuant to the Act, have investigated in conjunction with a multistate working group of Attorneys General certain acts and practices of Express Scripts, Inc., a Delaware corporation (hereinafter "Respondent"). Upon completion of such investigation, the Division has determined that certain of Respondent's acts and practices, more specifically described in Paragraph 2 of this Petition, constitute unfair and deceptive acts or practices affecting the conduct of trade or commerce in the State of Tennessee

in violation of Tenn. Code Ann. § 47-18-104(a), and further that such acts and practices constitute violations of Tenn. Code Ann. § 47-18-104(a), (b)(2), (b)(5), (b)(7), and (b)(27).

2. Based upon the multistate investigation of Respondent, the State of Tennessee alleges, upon information and belief, the following:

(A) Respondent is a Pharmacy Benefit Manager (“PBM”) which processes prescription drug claims, administers prescription drug benefit plans for insurers or employers and provides mail-order pharmacy services for patients of those insurers or employers.

Respondent also negotiates discounts with pharmacies and discounts and rebates with manufacturers and/or wholesalers in order to lower prescription drug prices.

(B) Respondent engaged in “drug interchange” programs, involving the solicitation by Respondent to a physician to agree to substitute one prescription medication chosen by a physician for another prescription medication chosen by the PBM from the same therapeutic class. “Drug interchange” programs are driven by economic considerations such as various contract terms which provide rebates and discounts if a manufacturer’s sales of particular drugs increase that may or may not directly save money for the patient. Some, but not all, such rebates and discounts are passed along or shared with the plans that are Respondent’s clients.

(C) Respondent employed several tactics to increase the sales of drugs which had large rebates. Respondent’s pharmacists and local retail pharmacists made statements to persuade patient-consumers and their doctors to switch to drugs that would net larger rebates. Likewise, Respondent sent newsletters and other promotional materials to doctors, and also sent patient-consumers and their doctors letters making statements that promoted a switch to drugs that would net larger rebates. Nearly all of these communications claimed that the reason for

these switches was cost savings. However, no back-up was presented to patients or doctors to show how the switch would save money. Many of the written communications sent to doctors and patient-consumers were paid for by specific drug companies, but that fact was not prominently disclosed.

(D) Respondent appeared to have the ability to characterize on its own and at will whether a drug was a brand-name drug or a generic drug. This had a significant impact on drug cost to the client and, ultimately, to patient-consumers, because most PBM contracts with benefit plan clients mandate a much larger discount off average wholesale price (“AWP”) for a generic. Respondent uses maximum allowable cost (“MAC”) to price some generic drugs. MAC pricing is simply a flat price for particular types of drugs. Usually the AWP discount on a MAC drug would be greater than 50% off AWP. As with generic drugs, generally Respondent appeared to have the ability to move drugs on and off the MAC list at its discretion and without notice to employers or their consumer employees.

(E) Respondent’s conduct described herein constitutes unfair and deceptive acts or practices.

3. Respondent neither admits nor denies the allegations of Paragraph 2 (A-E).

4. Upon completion of the multistate investigation, the Division requested that the Attorney General negotiate, and if possible accept, an Assurance of Voluntary Compliance in accordance with the provisions set forth in Tenn. Code Ann. § 47-18-107.

5. The Attorney General entered into multistate negotiations with Respondent and the parties have agreed to, and the Division has approved, the Assurance of Voluntary Compliance filed contemporaneously herewith.

6. In accordance with the provisions of Tenn. Code Ann. § 47-18-107(c), the execution, delivery and filing of the Assurance does not constitute an admission of prior violation of the Act.

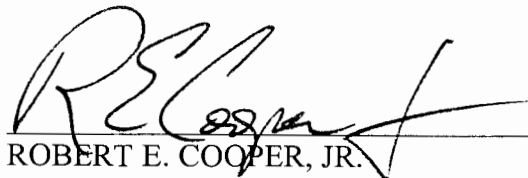
7. The Division, the Attorney General, and the Respondent have jointly agreed to the Assurance of Voluntary Compliance and join in its filing.

PREMISES CONSIDERED, Petitioner prays

1. That this Petition be filed without cost bond pursuant to the provisions of Tenn. Code Ann. §§ 20-13-101 and 47-18-116.

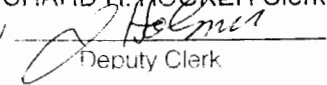
2. That the Assurance of Voluntary Compliance be approved and filed in accordance with the provisions of the Tennessee Consumer Protection Act.

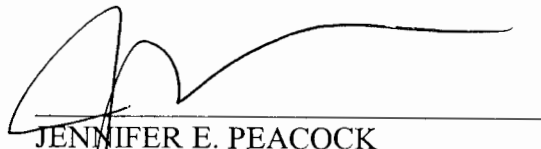
Respectfully submitted,



ROBERT E. COOPER, JR.
Attorney General & Reporter
B.P.R. No. 10934

I hereby certify that this is a true copy
of original instrument filed in my office
this 29th day of May 2008

RICHARD B. FROOKER Clerk
By  Deputy Clerk



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